No. 89-1845

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ALI BOURESLAN,

Petitioner,

versus

ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER ALI BOURESLAN

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QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, as amended, protect a citizen of the United States, working outside the country for an American company, from discrimination by the employer because of the employee's race, religion, and national origin?

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OPINIONS BELOW

The district court's memorandum and order dismissing the complaint, 653 F. Supp. 629 (S.D. Tex. 1987), is reproduced in the appendix to the petition for certiorari at page A-1. The panel and en banc opinions of the court of appeals, 857 F.2d 1014 (5 Cir.

1988), *on rehearing en banc*, 892 F.2d 1271 (5 Cir. 1990), are reproduced in the petition for certiorari at pages B-1 and C-1.

JURISDICTION

The Equal Employment Opportunity Commission's notice of right to sue under Title VII was issued on April 12, 1985. Boureslan filed a timely Title VII complaint in the United States district court on June 20, 1985.

The district court's judgment dismissing the case was entered on January 27, 1987. Boureslan's timely notice of appeal was filed on February 25, 1987.

The en banc court of appeals' opinion and judgment were entered on February 2, 1990. Justice White granted Boureslan's timely application to extend the time for petitioning for certiorari, to and including May 23, 1990. The petition was filed within the extension requested.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, are reproduced as an appendix to the petition for certiorari at page D-1.

STATEMENT OF THE CASE

Ali Salim Boureslan is a Moslem and a naturalized United States citizen born in Lebanon. In July 1979 he was hired as an engineer by Aramco Services Company (ASC), a Delaware corporation with its principal place of business in Houston. After working in the United States for approximately 16 months, he applied for employment with ASC's parent company, Arabian American Oil Company (ARAMCO), a Delaware corporation with its principal place of business in Dhahran, Saudi Arabia. Boureslan went to work for ARAMCO in Saudi Arabia in November 1980. He was fired in June 1984.

Boureslan filed a complaint with the Equal Employment Opportunity Commission, alleging that his firing was pretextual and that his employment had been terminated only after sustained insults, slurs, and harassment by superiors and coworkers, beginning in 1981, arising from his race, religion, and national origin. Unable to complete its administrative processing of Boureslan's charges within 180 days, the EEOC issued its notice of right to sue on April 12, 1985.

Boureslan then filed a timely complaint against ARAMCO and ASC in the United States District Court for the Southern District of Texas in Houston, again alleging that his rights under Title VII had been violated. He also invoked pendent jurisdiction in asserting various claims under state law. Both defendants answered the complaint, denied its

allegations on the merits, and moved to dismiss it under Rule 12(b)(1), F.R.Civ.P., for lack of subject matter jurisdiction, arguing that Title VII has no extraterritorial application to employment practices by American employers outside the United States. ASC also moved to dismiss on the additional grounds that the allegedly discriminatory employment practices had occurred after Boureslan had left its employment, and that Boureslan had not exhausted administrative remedies with respect to his claims against ASC.

The district court granted both motions, adopting the view that "[t]here is no indication that Congress was concerned about discrimination abroad" in enacting Title VII, and that "the absence of a clearly expressed intent creates a presumption that Congress did not intend extraterritorial application." 653 F. Supp. at 630. Analogizing Title VII to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, which prior to its amendment in 1986 had been held not to apply to employment practices of American companies outside the United States, the court also concluded that potential conflicts between Title VII and foreign employment laws would "[infringe] on the sovereignty of other nations." 653 F. Supp. at 631.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed, invoking the rule of statutory construction that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). The panel majority rejected the inference that, by expressly

excluding from Title VII's reach "the employment of aliens outside any State," 42 U.S.C. § 2000e-1, Congress intended the legislation to extend to citizens employed abroad. Like the district court, the court of appeals panel found the legislative history of Title VII to be "no more specific than the statutory language itself," 857 F.2d at 1019, and concluded that extraterritorial application was not warranted, "[g]iven the serious, potentially divisive policy considerations for and against application of the Act outside the country [and] the paucity of reference to such an application either in the Act itself or the debates in Congress . . ." 857 F.2d at 1020.

Judge King dissented, finding unpersuasive the panel majority's implication "that nothing short of an explicit statement by Congress will overcome the presumption" against extraterritorial application of federal legislation. 857 F.2d at 1022. "[T]he alien exemption provision would be meaningless if Title VII did not apply extraterritorially; there is no need to exempt aliens employed abroad from coverage if *no one* is covered abroad." 857 F.2d at 1032. Judge King believed that "Congress could reasonably have concluded that exempting aliens employed abroad would eliminate any obstacle to protecting U.S. citizens employed abroad by U.S. corporations," 857 F.2d at 1034.

Following publication of the panel opinion, the EEOC moved for and was granted leave to intervene as a party in support of Boureslan's position. The court of appeals granted rehearing en banc and,

dividing nine to five, again affirmed the district court's dismissal, reaffirming the view that "Title VII does not reflect the necessary clear expression of congressional intent to extend its reach beyond our borders." 892 F.2d at 1274. Four judges joined Judge King's dissenting views that the alien exemption clause and the other language of the statute confer its protection on citizens employed abroad by American employers, that such an application would not offend or compromise principles of international law, and that "the salutary goals of Title VII cannot be fully realized if the fortuitous location of an American employee at the overseas office of an American firm could mean the difference between equal opportunity and discrimination at will." 892 F.2d at 1282.

SUMMARY OF THE ARGUMENT

The brief of the Solicitor General on behalf of the Equal Employment Opportunity Commission in No. 89-1838 persuasively demonstrates why the Fifth Circuit's decision in this case is wrong. Boureslan adopts the Government's arguments in that brief without qualification or reservation. He believes only two points should be highlighted.

First, by explicitly exempting aliens employed abroad,[1] and by recognizing, in the exemption for bona fide occupational qualifications, the need to accommodate the legitimate differences between different kinds of people and the firmly entrenched

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1 42 U.S.C. § 2000e-1.

national policy against invidious employment discrimination,[2] Congress has created two narrow exceptions to the otherwise expansive reach of the Act. Carving out an additional broad, across-the-board, geographically-based exclusion for all otherwise unlawful employment practices inflicted outside the United States on citizens of this country by domestic employers would be fundamentally inconsistent with that cautious, case-specific approach.

Secondly, Congress was concerned with much more than this country's relations with Saudi Arabia, and with citizens permanently working and residing abroad, when it enacted and amended Title VII. That concern properly extends to invidiously discriminatory employment policies formulated domestically and implemented internationally, as well as to discrimination inflicted by policies and practices arising wholly outside the territorial limits of the United States. If ARAMCO is correct, an employment policy or practice violative of Title VII, even if crafted by an American employer within this country, nonetheless is totally exempted from scrutiny if its discriminatory consequences are inflicted outside the territorial boundaries of the United States. Congress simply cannot be said to have intended such a result.

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2 42 U.S.C. § 2000e-2(e); Dothard v. Rawlinson, 433 U.S. 321 (1977).

ARGUMENT

1. Title VII's long-standing national employment policy extends to all American employers of all United States citizens anywhere in the world, subject to qualifications likewise applicable to domestic employment.

Suppose, hypothetically, that a large Houston law firm[3] decides to open and maintain an office in Paris to take advantage of increasing financial opportunities for lawyers in the European business community. The hypothetical firm elects to employ only attorneys and staff previously based in Houston; it hires no French or other foreign nationals. The hypothetical firm adopts three policies or practices, two *de jure* and one *de facto*, all of which would violate Title VII if implemented in its Houston office but which, under the Fifth Circuit's decision, are perfectly lawful when confined to its operations in Paris.[4]

First, nominally because of escalating European terrorism and the perceived inability of women lawyers

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3 Cf. Hishon v. King & Spalding, 467 U.S. 69 (1984) (Title VII applicable to large Atlanta law firm).

4 Of course, the geographical location at which an American company makes its employment and personnel decisions cannot determine the reach of Title VII. Otherwise, those managing a domestic corporation or other business entity could easily evade federal law simply by adjourning to a foreign country the meetings formulating and implementing company employment policies.

to take care of themselves, the firm bars all female attorneys from the Paris office. Believing that secretarial, maintenance, and janitorial staff are a tougher breed, it permits Houston women to apply for and work in these positions.

Second, in order to avoid offending its largest and wealthiest client, a notoriously racist French industrialist, the hypothetical firm excludes all black attorneys and support staff from employment in the Paris office. It adopts this policy openly, and without apology, simply because of the financial considerations involved.

Finally, after opening and operating its Paris branch for several months, the hypothetical firm's management hears unsettling rumors, some of which eventually prove to be well-founded, that somewhere out over the Atlantic, at around 43,000 feet, male attorneys traveling to the new office with their female secretaries have engaged in what otherwise would have been plainly inappropriate behavior back in Houston -- for example, crude sexual innuendoes and attempted sexual assaults in the lavatory. Concluding that the exuberance of moving to Paris does not justify but at least explains this misconduct, the firm does nothing when the female employees complain.

Purportedly because there is no "clear evidence" of a congressional purpose to condemn and remedy quintessentially American violations of Title VII abroad, because -- and only because -- of their extraterritorial character, the Fifth Circuit's decision

permits, as a matter of national policy, the perpetuation of each of the foregoing invidiously discriminatory employment practices, simply because they are implemented outside the United States. A moment's reflection should reveal this is not and cannot be correct.

First, despite ARAMCO's portentous warning in the court of appeals that confirming Title VII's extraterritorial application will risk grave international conflicts with the domestic laws of the host nation, the mere potential for such conflict is hardly relevant to a determination of congressional purpose. In its enactment of Title VII Congress explicitly has recognized the tension between the eradication of invidious discrimination in the workplace and the legitimate differences between and among different classes of people, both domestically and internationally. It has spoken specifically to the problem, both in the alien exclusion provision and in the exemption for bona fide occupational qualifications. It is hardly appropriate for the federal judiciary now to say that the congressional policy is so inefficacious or unworkable as to justify the dramatic expedient of limiting the legislation exclusively to the confines of the United States. Such an approach snatches away the congressional scalpel and heavy-handedly substitutes a judicial meat-ax.

Second, there is neither empirical nor intuitive support for ARAMCO's implausible assertion that the mere potential for conflicts between Title VII and the laws, customs, and traditions of other countries will be

the norm, rather than the exception.[5] In many instances an American employment presence overseas may consist of a virtually self-contained enclave of United States citizens, in which no foreign nationals are employed at all. There could hardly be in such circumstances any realistic potential for conflicts or confrontation between Title VII and the domestic employment policies of the host nation. Even if there were such a possibility, there would be ample opportunity to resolve that conflict, if and when it actually arises. And as the dissenting opinion below correctly perceives, at least one kind of invidious treatment -- discrimination based on race -- has been universally condemned in the international community, regardless of whether it is countenanced by local law or custom.

Third, hypothesized intra-company conflicts between the application of Title VII to United States citizens working abroad and foreign laws applicable to the simultaneous employment of foreign nationals are simply irrelevant in the presumably large number of instances in which only American citizens, and no foreigners at all, are employed overseas. Since bona fide occupational qualifications are implicated here, too, there is simply no good reason for attributing to Congress the all-or-nothing-at-all approach the court

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5 As the dissenting opinion below points out, "the fact that we can hypothesize situations in which a conflict would arise does not mean that a statute must be construed so that it never applies abroad." 892 F.2d at 1282.

of appeals majority mistakenly found persuasive. Indeed, it would be exceedingly strange for Congress to deal with such an intricate, fact-specific problem, implicating virtually an infinite number of variables, by simply saying the matter is too complicated for anything other than a policy of sweeping exclusion.

Fourth, in an area as sensitive and focused in the national consciousness as the historical and in many instances outrageous injustices occasioned by racial, ethnic, and gender-based discrimination, both in employment practices and in other areas, a national policy of inaction or non-action is functionally equivalent to an affirmative policy of tolerance and condonation. If the court of appeals majority is correct, Congress has permitted American employers overseas to practice deliberately, openly, and without equivocation the most blatant forms of invidious employment discrimination and has consciously elected to deprive citizens of the United States working outside the country of even the most minimal, elementary forms of redress in the federal courts for such mistreatment. Our entire national history over the past 26 years, from the Civil Rights Act of 1964 to the Civil Rights Act of 1990, resoundingly refutes such an absurdity.

Finally, in any number of imaginable instances, *every one* of the reasons advanced by ARAMCO and the court of appeals for attributing to Congress an uncharacteristic tolerance for invidious employment discrimination will be practically irrelevant to Title VII's rational application. In international airspace, on

the high seas, in Antarctica, on remote desert islands, and in countries whose anti-discrimination employment policies complement rather than contravene those of the United States, or who simply have adopted no policy at all and do not care how the United States deals with its own citizens, Congress could have had no imaginable reason for depriving citizens of this country, working for employers based in the United States, of the protection that federal law ordinarily provides. Ascribing such a motive to Congress in this instance is simply inherently implausible.[6]

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6 Judge King pointedly underscored in her dissent to the panel opinion that "U.S. employers should not be allowed to escape liability for discrimination [violating Title VII] by cloaking themselves in a conveniently acquired concern for the integrity of the sovereignty of foreign states." 857 F.2d at 1035.

2. Congress necessarily must have intended to condemn under Title VII invidiously discriminatory employment practices, formulated within this country but implemented outside the nation's borders, against citizens residing within the United States but traveling temporarily abroad.

The factual context within which this controversy arises, involving a Middle Eastern nation whose cultural traditions and religious practices historically have countenanced precisely the sort of invidious discrimination that Title VII outlaws as a matter of this country's most fundamental employment policy, and a corporate employer that is virtually a domestic extension of the Saudi government, puts a predictable but nonetheless potentially distracting spin on the legal question presented, which after all, in the last analysis, requires little more than determining what Congress intended. What should not be lost in the shuffle of arcane questions of international law, legislative history, and textual interpretation is a clear realization that Congress was not particularly concerned with Saudi Arabia when it enacted this legislation.

Suppose, hypothetically, that a small Houston computer manufacturer decides to send some of its sales force and technical representatives to a computer trade show in London for 10 days to demonstrate its newest products. The hypothetical company has no permanent office or base of operations overseas, employs no one outside the United States, and has never exhibited products in a foreign country before.

Upon arrival in England, erroneously concluding that the British are hopelessly racist and anti-semitic, the company's president sends home a black and a Jewish employee, recognizing that this will deprive the employees of valuable opportunities for advancement within the organization, as well as extremely lucrative sales commissions, but that the company's interests nonetheless require it. The company also has sent an attractive female employee, and while in London she is repeatedly subjected to sexual harassment by the company's president. Upon returning to Houston she complains indignantly, but to no avail. The CEO, smirking, shows her a copy of the Fifth Circuit's en banc opinion in *Boureslan v. ARAMCO*. Under that decision, simply because the offending conduct occurred outside the United States, the employer has violated no federal right, and the aggrieved employee has no federal remedy.[7]

There are two circumstances that almost escape notice in the lengthy majority and dissenting opinions in the court of appeals and in ARAMCO's briefs. First, principles of territoriality are of little consequence if the employment policies of employers existing and operating under the laws of this country are *formulated* here, irrespective of where they are *implemented*. Title

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7 Indeed, it is not at all clear that the Fifth Circuit majority would find Title VII condemns an invidiously discriminatory employment policy or decision formulated by an American company wholly within the territorial limits of the United States, if the policy is actually implemented or executed abroad.

VII focuses as much on discriminatory employment decisions as it does on the consequences or effects of such decisions. Thus, apart from the conflicts-of-laws problems and supposedly momentous issues of international relations that ARAMCO's capable counsel so cunningly construct, there is little to distinguish an illegal act that is conceived and executed within the boundaries of the United States and a plot that is hatched inside the country and executed abroad. Either one is illegal. Extraterritorial discrimination simply cannot be inflicted without express or tacit approval from home.

Secondly, because ARAMCO and its employees are permanently based and reside in a foreign country, there is a natural and inevitable tendency to conceive the question of statutory interpretation presented by this case solely in terms of citizens of the United States living and working abroad on a permanent or semi-permanent basis. Self-evidently, however, a large part of the business that American companies conduct overseas is accomplished through citizens of the United States, residing in this country, traveling abroad temporarily. ARAMCO's arguments reach them, too, and accepted uncritically work a sweeping deprivation of individual rights under federal law on the basis of a single circumstance -- the geographical location of the offending conduct -- that in many, if not most, instances will be utterly irrelevant to a rational, informed determination of whether federal employment policies should be extended extraterritorially or not.

The long and short of it, as the Solicitor General's brief explains in convincing detail, is that the extraterritorial application of federal laws condemning invidious discrimination in employment is, indeed, as ARAMCO maintains, "a policy matter for Congress to decide" (Brief in Opposition to Certiorari at 20). Twenty-six years ago, Congress did decide. It is simply too late to turn back now.

CONCLUSION

For the foregoing reasons, Petitioner Ali Boureslan suggests that the judgment of the Court of Appeals should be reversed.

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